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95507—36

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 332

FRANCIS I. DUPONT, EDMUND DUPONT, RHETT DUPONT, E. PAUL DUPONT, WILLIAM A. FINE, ARTHUR F. SHETTLE AND WILLIAM A. WHITAKER, CO-PARTNERS, TRADING UNDER THE FIRM NAME AND STYLE OF FRANCIS I. DUPONT & COMPANY, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 35–37) is not officially reported. The opinion of the Circuit Court of Appeals (R. 49–52) is reported in 83 F. (2d) 951 (C. C. A. 2d).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1936 (R. 52). The petition for certiorari was filed on September 1, 1936. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a transaction between two members of the New York Cotton Exchange constitues a sale, agreement of sale, or an agreement to sell at, or under the rules or usages of, the Exchange, within the meaning of Section 800, Schedule A–4 of the Revenue Act of 1926.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 9–14.

STATEMENT

Petitioners are cotton brokers and members of the New York Cotton Exchange. Prior to March 23, 1924 (R. 3) they had purchased 24,100 bales of cotton for future delivery on behalf of certain customers. Shortly prior to March 23, 1934, said customers requested petitioners to transfer their accounts to Messrs. Fenner & Beane, also members of said Exchange (R. 3, 12).

On March 23, 1934, petitioners carried out said instructions by delivering a "sold" memorandum to Fenner & Beane, who in turn delivered a "bought" memorandum to petitioners. No commission was charged, although Section 7 of the

Commission Law Rules of the New York Cotton Exchange (R. 32) required that full commission be charged for both buying and selling where contracts are transferred at the customer's request. The opinion of the District Court departed from the allegations of Paragraph 5 of the sworn complaint (R. 3) wherein it is alleged that petitioners were instructed by their customers to transfer the contracts. The affidavit of John P. Collins (R. 12) likewise states that the transfer was pursuant to the customers' instructions. A subsequent affidavit by Collins (R. 15) attempts to qualify his earlier affidavit and to contradict Paragraph 5 of the complaint. Under Section 33 of the by-laws of the Cotton Exchange (R. 27) all contracts for the future delivery of cotton are required to be cleared through the New York Cotton Exchange Clearing Association and the transaction in question was so cleared (R. 13). There are no other mechanics provided for clearing such transactions, including the so-called "transfer of accounts" (R. 14). Under the usages of the Clearing Association, according to the affidavit of its secretary and treasurer, every purchase and sale of cotton for future delivery from one member to another had to be recorded for clearance by the Association on forms like "Exhibits 1, 2 and 3" (R. 24), as were executed by petitioners and Fenner & Beane.

Stamp taxes of $729.40 were paid by petitioners on said transaction which was listed as a sale on a monthly stamp-tax memorandum to which said

stamps were affixed. (R. 23.) A claim for refund was filed and after rejection suit was brought in the District Court which rendered judgment for the United States upon petitioners' motions to strike respondent's answer and for summary judgment, and similar cross-motions by respondent. (R. 1.) The Circuit Court of Appeals affirmed said judgment. (R. 52.)

ARGUMENT

The tax has not been imposed upon a transfer by a customer, but upon a transaction between petitioners and Fenner & Beane. The desire of the customer to transfer his account from one broker to another was merely the underlying incident which gave rise to the transaction taxable under Section 800 and Schedule A–4 of the Revenue Act of 1926. The first question presented by the petition is not here.

Petitioners, in substance, contend:

(1) That the statute contemplates a document or memorandum evidencing a "bona fide" sale and not a sale effected to result in a change in brokers, and—

(2) That the transaction in question is expressly excepted as a "transferred or scratch sale." These contentions were rejected by the court and judgment entered dismissing the complaint upon the pleadings and supporting affidavits.

Section 33 of the by-laws of the Exchange provided that no contract for future delivery shall be recognized or enforced by the Exchange, "unless

both parties thereto shall be members of the New York Cotton Exchange."

Petitioners incurred personal liability on contracts to purchase cotton to be delivered in the future; when instructed to "transfer" the accounts to Fenner & Beane, they executed, passed and recorded the usual "bought" and "sold" memoranda and protected themselves with respect to their said personal liability by obtaining the obligation of Fenner & Beane to receive delivery of a like amount of cotton from petitioners.

The court below held the transaction was a sale in substance as well as form (R. 51); and petitioners' contention that the tax has been imposed merely because certain printed forms were used is groundless.

However, whether the transaction be treated as a sale in substance or only as assuming the form of a sale under the rules and usages of the Exchange, the stamp tax liability under Section 800, Schedule A–4, *supra,* clearly attaches and the burden rests with the taxpayer to bring himself within one of the excepted classes under the Act.

Transactions excepted from the tax are "so-called transferred or scratch sales" and those where "sellers of commodities * * * having paid the tax * * * transfer such contracts to a clearing-house corporation or association." Such transfers "shall not be deemed to be a sale, or agreement of sale, or an agreement to sell within the * * * Act, provided that such transfer shall not vest any beneficial interest in such clearing-house associa-

tion, but shall be made for the sole purpose of enabling such clearing-house association to adjust and balance the accounts *of the members* of such clearing-house association on their several contracts" (italics supplied). The latter exception enables the clearing-house to settle and clear the accounts of brokers at the end of each day without the transaction being subjected to tax.

Petitioners' transaction does not fall within either exception. The "transferred or scratch sale", as defined in Articles 44 (a) and 125 (3) (c) of Treasury Regulations 71,[1] requires that the purchase and sale be made at the same exchange, on the same day, at the same price, and for the account of the same person. Petitioners' sale to Fenner & Beane was made on March 23, 1934, whereas the purchases for petitioners' customers were made prior thereto. Since the purchases and sales were not made on the same day, the transaction was not within said exception. The court below so held. (R. 52.)

Petitioners rely chiefly upon an alleged conflict with *United States* v. *Uhlmann Grain Co.* (C. C. A. 7th), decided June 18, 1936, not yet officially reported, but found in Prentice-Hall, 1936, Vol. 1, Par. 1323. A careful analysis, however, of the two cases discloses that there is no real conflict. The

[1] Said Treasury Regulations are in accord with the testimony of James H. Winston, lawyer, representing dealers of the Chicago Board of Trade, reported in Vol. II of the hearings of the House of Representatives on the Revenue Act of 1918, Miscellaneous Taxes, at page 1212, et seq.

only similarity is that the same taxing section was involved and substantially the same contention asserted by the Government. The question in the *Uhlmann* case was whether certain transactions known in the parlance of the Board of Trade as "accommodation trades" or "position loans" devised by traders to reduce their daily marginal requirements and entered into with the knowledge and approval of the Board of Trade were taxable as sales, agreements of sale or agreements to sell. Each "accommodation trade" was reported by both parties as an "accommodation trade" to the Grain Futures Administration of the Department of Agriculture in the daily reports required to be made to that Department. The transaction was held not taxable. The court there held that such trades are distinguishable from the transaction involved in the instant case, on the ground that in that case "there was no intention on the part of either party that the second should have anything to perform", whereas in the present case both parties intend "that the second should perform the contract"—in other words, an incomplete transaction in one case and a complete transaction in the other.

It follows, therefore, that on the authority of the *Uhlmann* decision itself there is no conflict with the instant case. Here, the second broker, Fenner & Beane, intended to perform by accepting delivery of the cotton, whereas in the *Uhlmann* case it was never intended by either party that the second, or accommodating broker, should perform by accept-

ing delivery. The first broker was still to accept delivery.

But, even were a conflict to exist, the more important fact is that the question involved in the *Uhlmann* case is now moot and no longer of general importance. Under Section 4c of the Commodity Exchange Act of June 15, 1936 (Public, No. 675, 74th Cong., 2d Sess.), "accommodation trades" and "fictitous sales" are prohibited and therefore a situation similar to that in the *Uhlmann case* cannot now be repeated.

Union Trust Co. v. *Heiner,* 26 F. (2d) 391 (W. D. Pa.), and the other District Court cases referred to (p. 7) are decidedly different in their fact situations and arise under a different section of the documentary stamp Act. Moreover, a divergence of view between District Courts and a Circuit Court of Appeals does not justify certiorari under the rules of this Court.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition should, therefore, be denied.

Respectfully submitted.

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SEPTEMBER 1936.

APPENDIX

Revenue Act of 1926, 44 Stat. 9:

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.

SCHEDULE A.—STAMP TAXES

* * * * *

4. Produce, sales of, on exchange: Upon each sale, agreement of sale, or agreement to sell (not including so-called transferred or scratch sales), any products or merchandise at, or under the rules or usages of, any exchange, or board of trade, or other similar place, for future delivery, for each $100 in value of the merchandise covered by said sale or agreement of sale or agreement to

sell, 1 cent, and for each additional $100 or fractional part thereof in excess of $100, 1 cent: *Provided,* That on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale: *Provided further,* That sellers of commodities described herein, having paid the tax provided by this subdivision, may transfer such contracts to a clearing-house corporation or association, and such transfer shall not be deemed to be a sale, or agreement of sale, or an agreement to sell within the provisions of this Act, provided that such transfer shall not vest any beneficial interest in such clearing-house association but shall be made for the sole purpose of enabling such clearing-house association to adjust and balance the accounts of the members of such clearing-house association on their several contracts. Every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person, who makes any such sale or agreement of sale, or agreement to sell, or who, in pursuance of any such sale, agreement of sale, or agreement to sell, delivers any such products or merchandise without a bill, memorandum, or other evidence thereof as herein required, or who delivers such bill, memorandum, or other evidence of sale, or agreement to sell, without having

the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000 or be imprisoned not more than six months, or both.

No bill, memorandum, agreement, or other evidence of such sale, or agreement of sale, or agreement to sell, in case of cash sales of products or merchandise for immediate or prompt delivery which in good faith are actually intended to be delivered shall be subject to this tax.

This subdivision shall not affect but shall be in addition to the provisions of the "United States cotton futures Act," approved August 11, 1916, as amended, and "The Future Trading Act," approved August 24, 1921.

Treasury Regulations 71:

ART. 44. *Transactions not subject to tax.*—(a) So-called "transfer or scratch sales" or "pass-outs" are not subject to the tax: *Provided,* That the purchase and sale are made at the same exchange, on the same day, at the same price, and for the account of the same person.

* * * * *

ART. 125.

* * * * *

(3) As used in Chapter IV of these regulations—

* * * * *

(c) The term "transferred or scratch sale" includes "pass-outs" or those transactions in which a person buys from another a certain quantity of any product at a certain price, and at the same session of an exchange, sells to a third person the same

quantity of the same product at the same price, and eliminates himself by instructing the person from whom he bought to deliver such product to the person to whom he sold; but no transaction in which a broker or a commission member of an exchange receives a commission greater than that charged to a person who executes his own contracts shall be deemed to be a "transfer" or a "scratch sale";

* * * * *

(Public, No. 675—74th Congress, 2d Sess.)

[H. R. 6772]

An Act to amend the Grain Futures Act to prevent and remove obstructions and burdens upon interstate commerce in grains and other commodities by regulating transactions therein on commodity futures exchanges, to limit or abolish short selling, to curb manipulation, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Grain Futures Act (U. S. C., 1934 ed., title 7, sec. 1) is amended to read as follows: "That this Act may be cited as the 'Commodity Exchange Act.' "

SEC. 2. The Grain Futures Act (U. S. C., 1934 ed., title 7, secs. 1 to 17, inclusive) is amended by striking out the word "grain" wherever it appears in such Act and inserting in lieu thereof "commodity", "any commodity", or "commodities", as the case may require, and by striking out the phrase "cash grain" wherever such phrase appears and inserting in lieu thereof "any cash commodity."

SEC. 3. Section 2 of the Grain Futures Act (U. S. C., 1934 ed., title 7, secs. 2, 3 and 4) is amended by—

(a) striking out the third sentence of paragraph (a) and inserting in lieu thereof the following: "The word 'commodity' shall mean wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs and tuberosum (Irish potatoes)"; and

* * * * *

SEC. 5. The Grain Futures Act is amended by adding after section 4 (U. S. C., 1934 ed., title 7, sec. 6) the following new sections:

* * * * *

SEC. 4c. It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of, any transaction involving any commodity, which is or may be used for (1) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) if such transaction is, is of the character of, or is commonoly known to the trade as, a "wash sale", "cross trade", or "accommodation trade", or is a fictitious sale;

(B) if such transaction is, is of the character of, or is commonly known to the trade as, a "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", or

(C) if such transaction is used to cause any price to be reported, registered, or

recorded which is not a true and bona fide price.

Nothing in this section shall be construed to prevent the exchange of futures in connection with cash commodity transactions or of futures for cash commodities, or of transfer trades or office trades if made in accordance with board of trade rules applying to such transactions and such rules shall not have been disapproved by the Secretary of Agriculture. Nothing in this section or section 4b shall be construed to impair any State law applicable to any transaction enumerated or described in such sections.

* * * * *

Approved, June 15, 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936